A **TAN BOON LEE**

v.

TAN BOON HUAT & ORS

B HIGH COURT MALAYA, IPOH
CHE MOHD RUZIMA GHAZALI JC
[CIVIL SUIT NO: 22NCVC-83-2011]
29 SEPTEMBER 2014

C ***CIVIL PROCEDURE:*** *Contempt of court - Committal proceedings - Whether first committal order breached - Whether order vague - Whether applicant exhausted all remedies - Whether contempt proven beyond reasonable doubt - Rules of Court 2012, O. 52 r. 4*

D The tenth defendant ('applicant') made an application for committal proceedings under O. 52 r. 4 of the Rules of Court 2012 against the respondent ('plaintiff') for failing or refusing to deliver machineries and other related equipment within a specific time period. In continuing to use the said machineries, it was argued that the plaintiff was in breach of an earlier committal order granted in 2012 ('the first committal E order'). Under the first committal order, the plaintiff was found guilty of contempt and was punished with a fine of RM10,000 in default of which the plaintiff would be committed to prison for an imprisonment term of one month. The fine was to be paid immediately after the pronouncement of the first committal order. The applicant alleged that the plaintiff had interfered with the due administration of justice by F deliberately breaching the first committal order and therefore, committed contempt against the court to which only a custodial sentence would be appropriate. Meanwhile, the plaintiff made an application to set aside the leave order on the ground that the applicant had failed to show that it had a *prima facie* case against the plaintiff.

G **Held (allowing plaintiff's application with costs):**

(1) The draft order was drafted by the applicant to include a remedial clause, *ie*, a fine of RM500 per day on the plaintiff if he failed to return the machineries to the applicant in the specified timeline. The H court had approved and granted the first committal order accordingly. Therefore, the applicant was bound by the provisions stated in the first committal order. The applicant had to exhaust all remedies provided in the first committal order before seeking other remedies. There is no shortcut in taking action against the plaintiff I when there is a specific remedy immediately available and enforceable by the applicant. (para 12)

(2) The first committal order was vague, in that it did not give the plaintiff a fair chance to know his exact obligations under the said order. The plaintiff should have been notified of the exact identity and number of machineries involved, in order to answer to the applicant's allegations or any charges put against him. Since the burden of proof in a committal proceeding is beyond reasonable doubt, the plaintiff should be given the benefit of the doubt from the vagueness of the first committal order. (para 18)

Case(s) referred to:
Chiltern District Council v. Keane [1985] 2 All ER 118 ***(refd)***
McIlraith v. Grady [1968] 1 QB 468 ***(refd)***
Re B (JA) (An Infant) [1965] 1 Ch 1112 ***(refd)***
Re Bramblevale Ltd [1970] 1 Ch 125 ***(refd)***
Tan Sri Dato (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***

Legislation referred to:
Rules of Court 2012, O. 52 rr. 3(2), 4

For the applicant - Alvin Tang Wye Keet (Ahmad Shahrizal with him); M/s Ranjit Ooi & Robert Low
For the respondent - Yusof Zainal Abidin (Lim Kon Keen & Zulaikha Fardi with him); M/s Salehuddin Saidin

Reported by Lyana Shohaimay

JUDGMENT

Che Mohd Ruzima Ghazali JC:

Introduction

[1] This is an application pursuant to the leave order given to the tenth defendant ('the applicant') on 1 July 2013 *vide* the notice of application in encl. 106 and the notice to show cause in encl. 107 for committal proceeding pursuant to O. 52 r. 4 of the Rules of Court 2012 against the plaintiff which is predicated on the plaintiff's action for failing or refusing to deliver up to the applicant the machineries and other related equipment which were removed by the plaintiff from Lot 43579, Jalan Chemor Estate Kampung Pisang, Chemor, Perak on 5 July 2011 and 6 July 2011 and in continuing to use the said machineries, in breach of an earlier committal order dated 1 October 2012. The applicant alleged that the plaintiff has perverted and interfered with the due administration of justice by usurping the authority of the court, undermining the sanctity of the legal proceedings pending determination of the court and

diminishing the confidence in the judicial system and therefore has committed an act of contempt and the applicant argued that a custodial sentence is the only appropriate sentence to be imposed.

[2] The plaintiff applied to set aside the *ex parte* leave order granted to the applicant *vide* the application encl. 127 on the grounds that from the facts given, the applicant failed to show that it had a *prima facie* case against the plaintiff.

The Law

[3] The Federal Court decision in the case of *Tan Sri Dato (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849; [2012] 3 MLJ 458 dealt extensively with the evolution of the law of contempt. The Rt Hon Arifin bin Zakaria CJ in his judgment has detailed out the guiding principle relating to the law of contempt which I totally adopt. I would like to emphasise that the committal proceeding is criminal in nature since it involves the liberty of a person. The observation and the decisions by Cross J in *Re B (JA) (An Infant)* [1965] 1 Ch 1112, Lord Denning MR in *McIlraith v. Grady* [1968] 1 QB 468, Lord Denning MR in another case of *Re Bramblevale Ltd* [1970] 1 Ch 125 and Sir Donaldson MR in *Chiltern District Council v. Keane* [1985] 2 All ER 118 cited by the Rt Hon CJ in the above case reminded me to be more careful and thorough in analysing all evidence available in this contempt proceeding. I also keep reminding myself that the burden of proof on the applicant is beyond reasonable doubt. With that in mind, I will know consider the plaintiff's application to set aside the order for leave and the applicant's application for contempt.

Background Facts

[4] On 3 April 2012, the applicant obtained leave to commence committal proceedings against plaintiff on the following act of contempt:

(i) Making a scurrilous abuse and insult against the court by loud utterance in public on 24 December 2011 at a site known as KM 44, Jalan Gerik-Jeli that 'Mahkamah Semua Tipu'.

(ii) Interfering with and removing some of the applicant's machineries, which machineries constitute a subject matter as well as part of the evidence relating to the matter pending in court from Lot 43579, Jalan Chemor Estate Kampung Pisang, Chemor, Perak on 5 July 2011 and 6 July 2011 and thereafter continued to conceal those machineries;

(iii) Interfering with and removing some of the applicant's machineries (the excavator bearing serial number KE-10, the three wheel-loaders bearing serial numbers 23, 31 and 32 and the barge), which

machineries constitute a subject matter as well as part of the evidence relating to the matter pending in court, from a site known was KM 44, Jalan Gerik-Jeli on 24 December 2011.

[5] The committal proceedings were heard on 17 May 2012 and 15 August 2012. On 1 October 2012, this court found that the plaintiff was guilty of contempt of court for the said acts and was punished with a fine of RM10,000 in default of which the plaintiff would be committed to prison for an imprisonment term of one month ('first committal order').

[6] To ensure that the plaintiff does not repeat the said acts of contempt, this court also ordered that the plaintiff is:

(a) Prevented and prohibited from continuing to and carrying out the same actions towards the assets of the applicants which from the subject matter of the dispute;

(b) Prevented and prohibited from continuing to use the machineries and related equipment which were removed from the applicant's premises which was within his possession; and

(c) To deliver up and return to the applicant the machineries and related equipment which were removed from the applicant's premises no later than seven days from the date of the first committal order and failing which, the plaintiff will be imposed a fine of RM500 per day until the subject matter has been returned to the applicant. If the plaintiff fails to pay the fine imposed, the applicant is at liberty to apply for enforcement, in default of which, will be substituted for a custodial punishment for a certain period of time at the relevant time.

[7] The fine of RM10,000 imposed on the plaintiff was paid to court immediately after the pronouncement of the first committal order. The main suit of this committal proceedings has been struck out on the application of the plaintiff to withdraw the suit on 17 March 2014 but the applicant had indicated that he wish to proceed with the second contempt proceedings against the plaintiff.

Applicant's Complain

[8] Despite having removed no less than 12 machineries from the premises on 5 July 2011 and 6 July 2011, the plaintiff informed that he will be returning only six machineries to the applicant. The applicant had further enquired when the plaintiff proposed to return the remaining machineries. The plaintiff took no step to return the remaining machineries. As at the timeline stated in the first committal order, that is 8 October 2012, only four machineries were returned to the applicant. Another two machineries were delivered to the applicant on 10 October 2012 and 19 October 2012, after the timeline stipulated in the first committal order.

[9] In the circumstances, the applicant contended that the plaintiff had no intention of either returning or delivering all of the said machineries and had deliberately breached the first committal order. Applicant verily believes that the plaintiff has committed and guilty of further contempt of court and can only be countenanced by at least a custodial sentence which has also been specifically provided for in the first committal order.

Plaintiff's Application To Set Aside the Order For Leave, Encl. 127

[10] Order 52 r. 3(2) of the Rules of Court 2012 provides that:

> Application to court (O. 52, r. 3)
>
> …
>
> (2) An application for such leave must be made *ex parte* to the court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

Upon perusing the cause papers filed by the applicants, I am of the opinion that the application was properly filed where all the requirements mentioned in the rules were followed. The application is supported by a statement describing amongst others, the person sought to be committed and the grounds on which he is alleged to be in contempt. It is also supported by an affidavit verifying the facts relied on in the statement. Therefore order for leave was granted to the applicant to issue notice to show cause to the plaintiff.

[11] The plaintiff, *vide* the encl. 127, sought to set aside the said order for leave granted on the grounds, *inter alia*, that:

(i) From the facts produced, the applicant failed to show a *prima facie* case for committal against the plaintiff;

(ii) The affidavit in support of the *ex parte* application was affirmed by a person not employed by the applicant and failed to establish that he has access to the applicant's documents and records;

(iii) The plaintiff verily believe that he has returned all machineries taken out from the applicant's premises according to the first committal order.

(iv) The first committal order dated 1 October 2012 was vague where it failed to precisely identify which machineries taken out from and to be return back to the applicant's premises.

(v) The applicant should exhaust all remedies mentioned in the first committal order. A

(vi) The applicant failed to comply with the principals of full and frank disclosure. In the affidavit in support of the *ex parte* application for the order for leave, the applicant had also listed the damaged machineries where it is impossible to be taken out from the applicant's premises. B

(vii) The applicant had waited for eight months to file the *ex parte* application for the order for leave, after the expiry date that was on 8 October 2012, for the plaintiff to comply with the first committal order and it was an inordinate delay. C

Analysis And Finding

[12] The applicant's *ex parte* application for the order for leave in this second committal proceedings totally relies on the first committal order dated 1 October 2012. As stated earlier, through the first committal order, the plaintiff was required to deliver up and return to the applicant the machineries and related equipment which were removed from the applicant's premises no later than seven days from the date of the first committal order. Fine of RM500 per day will be imposed on the plaintiff if he failed to return the machineries to the applicant in the specified timeline. If the plaintiff fails to pay the daily fine imposed, the applicant is at liberty to apply for enforcement that is to apply for the custodial punishment for a certain period of time. All the terms and the conditions or obligations for the plaintiff to follow are as provided in the first committal order. The applicant drafted the said order and chose to put it in such a manner that there was a remedial clause. The court approved and granted the first committal order according to what was applied by the applicant. Therefore, it is my considered view that the applicant is bound by the provision stated in the first committal order. The applicant has to exhaust all remedies provided in the first committal order before seeking another remedy. In other words, there is no shortcut in taking action against the plaintiff when there is a specific remedy meant to be enforced by the applicant. D E F G

[13] As it was clearly provided in the first committal order, the plaintiff can be fined up to RM500 per day of any default. The applicant should enforce the remedial clause against plaintiff immediately after such alleged default. The applicant should first execute the due performance of the plaintiff in the first committal order before coming back to this court for another committal proceedings. If the plaintiff failed to pay the daily fine, then only, the applicant can apply to the court for enforcement of the custodial punishment. H I

[14] Based on that reason alone, I am of the view that the applicant had no *prima facie* case for committal against the plaintiff in this second committal proceedings and the plaintiff's application to set aside the order for leave should be allowed.

[15] To complete my judgement, since both parties had submitted before me for the whole contempt proceedings, I would like to comment on the applicant's application *vide* encl. 106 as if the order for leave was not set aside. As stated above, the burden of proof in a committal proceedings is always on the applicant and the standard of proof is beyond reasonable doubt.

[16] Perusing the first committal order, I tend to agree with the plaintiff's counsels that the order drafted by the applicant and approved as a fair order is vague or I can say that it is not a complete order. It is pertinent to note that in the second paragraph of the first committal order, the obligation is on the plaintiff to return all the machineries taken from the applicant's premises. In the third paragraph the applicant mentioned a few machineries, ie, putting in bracket, one excavator bearing serial number KE-10, the three wheel-loader bearing serial numbers 23, 31 and 32 and also the barge. Only five machineries are mentioned in the said order and it does not stated anywhere that the list of the machineries in that paragraph is non exhaustive.

[17] However, in the affidavit in support of the *ex parte* application for order for leave, encl. 99A, at para. 9 the applicant averred that the machineries referred to in the list above only part of the machineries owned by the applicant as set out in annexure B to the statement of claim. Then, at para. 10 of the affidavit, the applicant said that prior to the removal of the said machineries by the plaintiff on 5 July 2011 and 6 July 2011, there is no less than 12 machineries kept in the applicant's premises compound. The applicant also produced a compact disc containing the videos of the plaintiff and his accomplices removing the said machineries, the various screenshots taken from the videos and the various pictures of the machineries said to be taken before and after the removal as exhibits. At para. 11, the applicant list down 12 machineries said to be identified from the pictures taken before the removal.

[18] The question is, why the applicant did not list down all the machineries taken out by the plaintiff on 5 July 2011 and 6 July 2011 in the first committal order? From all the exhibits tendered in the affidavit, which is dated prior to the acts of the removal, the applicant can easily identify and list down exactly which machineries had been taken out and to be returned back by the plaintiff in the first committal order. I am of the view that the plaintiff should be notified exactly as

to the identity and the numbers of machineries involved, so as to answer the applicant's allegation or any charges put forward against him. Therefore I found that the first committal order was vague and the plaintiff was not given fair chance to know his exact obligation in the said order. Since the burden of proof in a committal proceedings is beyond reasonable doubt, plaintiff should be given the benefit of the doubt from the vagueness of the first committal order.

Decision

[19] For the above reasons, I allowed the plaintiff's applications to set aside the order for leave issued against him and hence, the motion for committal against the plaintiff *vide* encl. 106 and notice to show cause *vide* encl. 107 are accordingly struck out with costs. The plaintiff's counsel has suggested the cost of RM10,000 and it was agreed by the applicant's counsel. Therefore I allowed the cost of RM10,000 to be paid to the plaintiff.